

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FLORIDA POWER & LIGHT COMPANY

and

Case 12-CA-211064

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCAL UNION 641

Rafael Aybar, Esq., for the General Counsel.

Richard J. Joy, Esq. and Christin M. Russell, Esq.,
Florida Power & Light Co. Law Department,
of Juno Beach, Florida, for the Respondent.

Greg King, of Naples, Florida, for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. In September 2017, Hurricane Irma struck the State of Florida and caused extensive damage, including to the electrical service of Respondent Florida Power & Light Company. To restore electricity, the Respondent utilized bargaining unit employees represented by Local 641 of the International Brotherhood of Electrical Workers union. The Respondent also brought in outside contractors. By agreement, all workers were scheduled for 6 a.m. to 10 p.m. shifts, with any work beyond those hours constituting overtime. The collective-bargaining agreement between the Respondent and the Union required the Company to offer any overtime work to unit employees before it could be offered to contractors. When the Union learned of the possibility that contractors were working outside the scheduled shift, it submitted an information request to the Respondent. The Union sought a list of all the contractors performing restoration work and the timesheets for contract workers. Although it provided the contractor list, the Respondent did not furnish the timesheets. The General Counsel's complaint alleges the Respondent violated Section 8(a)(5) of the National Labor Relations Act, by refusing to furnish relevant, requested information to the

Union. Because it did not provide all of the relevant, requested information, I conclude the Respondent violated the Act as alleged. I also find the Respondent unlawfully failed to inform the Union until the hearing that certain responsive information did not exist.

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STATEMENT OF THE CASE

On December 5, 2017, International Brotherhood of Electrical Workers (IBEW), AFL-CIO, Local Union 641 (the Charging Party) initiated this case by filing the original unfair labor practice charge in Case 12-CA-211064 against Florida Power & Light Company (the Respondent). The Charging Party is a member of System Council U-4 of the IBEW (collectively the Union). On May 4, 2018, the Union filed an amended charge. On May 31, 2018, the General Counsel, through the Regional Director for Region 12 of the National Labor Relations Board (the Board), issued a complaint against the Respondent. The complaint alleges the Respondent violated Section 8(a)(5) of the National Labor Relations Act (the Act) by failing and refusing to furnish the Union with information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of certain employees of the Respondent. On June 13, 2018, the Respondent filed an answer to the complaint, denying the substantive allegations and asserting multiple affirmative defenses. On October 29, 2018, in Naples, Florida, I conducted a trial on the complaint.

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On the entire record and after considering the briefs filed by the General Counsel and the Respondent on December 3, 2018, I make the following findings of fact and conclusions of law.¹

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FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the business of operating an electric public utility that transmits, distributes, and sells electricity at various locations throughout the State of Florida. The Respondent's principal office and place of business is in Juno Beach, Florida. In conducting its business operations during the past 12 months, the Respondent has derived gross revenues in excess of \$250,000. During the same time period, the Respondent has purchased and received, at its facilities in the State of Florida, goods valued in excess of \$50,000 directly from points outside the State of Florida. Accordingly, I find, as the Respondent admits, that, at all

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¹ In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. In assessing witnesses' credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed.Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility resolutions in my findings of fact.

material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find, and the Respondent admits, that IBEW System Council U-4 and IBEW Local 641 are labor organizations within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent provides electricity to over 4 million customers in Florida, employing roughly 15,000 people statewide to do so. Over 400,000 of those customers are in the Naples management area. Bruce Jamison is the Respondent's manager for distribution in that area. He is responsible for overseeing the maintenance and restoration of power to existing customers and providing electric service to new customers. The Respondent further divides its management areas into service centers. The four service centers involved in this case are Bonita Springs Workforce (BSW), Fort Myers Operations (FMO), Gladiolus Operations (GDO), and Golden Gate Operations (GGO). The IBEW represents about 2,900 employees of the Respondent statewide. IBEW Local 641 is the representative for approximately 180 to 185 of those employees in numerous job classifications. The employees work in the Respondent's nuclear, power systems, and power generation divisions. Among the workers the Union represents are 20 customer service, transmission, and substation employees. The current collective-bargaining agreement between the Respondent and the Union runs from October 31, 2017 to October 31, 2020. The prior agreement's term was from August 29, 2014 to October 31, 2017. Greg King is a senior line specialist who has been employed by the Respondent for almost 40 years. Since June 2013, King also has served as the president of IBEW Local 641. His duties as union president include insuring that the collective-bargaining agreement between the Respondent and the Union is enforced and filing grievances for contract violations.

A. The Union's Information Request

In September 2017, Hurricane Irma struck Florida and caused massive damage throughout the state.² The Respondent's electricity service was severely impacted, requiring extensive restoration work. In the Naples area, the Respondent set up four temporary staging sites in mid-September, from which the work was performed. The Respondent utilized both its own employees, as well as outside contractors, to complete the work. The contractors included workers from other utility companies. As had been their typical practice, the Respondent and the Union agreed that both bargaining unit employees and contractors would be scheduled to work from 6 a.m. to 10 p.m. (Tr. 28-29, 49-50, 53-54.) Any time worked beyond that would be overtime. Pursuant to provisions in the collective-bargaining agreement, the Respondent had to offer any overtime work to bargaining unit employees, before giving it to contractors. (GC Exh. 4, p. 9, art. 38(a); GC Exh. 5(b).) The Respondent completed its Irma restoration work and shut down the staging sites on September 24.

² All dates hereinafter are in 2017, unless otherwise noted.

While that work was ongoing, employees reported to King that contractors with a company called Wilco had told them they were working beyond the 6 a.m. to 10 p.m. shift. King also saw trucks used by a contractor named Northline Utilities in the morning outside the regular shift. King was concerned that contractors were working overtime hours that had not
 5 been offered to bargaining unit employees. As a result, on October 9, King emailed an information request to representatives of the Respondent, including Jamison. (GC Exh. 7, p. 3.) The subject of the request was "Utility and contractor timesheets." The first item King requested was:

- 10 Utility and contractor count by [service center] boundaries to include BSW, FMO, GDO and GGO. This should include foreign utility, contractors, embedded contractors as well as [Respondent] crews [that] traveled from other areas.
- 15 In layman's terms, King sought the names of all contractors who performed restoration work out of the four service centers. The list was to include any contractors employed by other utilities; local (embedded) and non-local contractors; and any Respondent crews/employees from outside the local area. The second item King requested was timesheets for all of the
 20 contractors covered by the first request, as well as timesheets for the Respondent's customer service, transmission, and substation employees. Both requests were for the time period from September 15 to October 8. King stated he needed the information for the "grievance process." Finally, King asked the Respondent to provide the information by October 29. The purpose of King's request was to determine if a grievance could be filed alleging the Respondent was using
 25 contractors outside the agreed-upon daily shift and not affording unit employees the opportunity to work overtime.³

B. The Company's Response to the Union's Information Request

- On October 25, King and Jamison met to discuss the Union's request for information.
 30 Jamison told King it would be hard for him to collect all the contractor timesheets for the requested time frame. He also asked King for specifics on why he needed the information. King told Jamison he had seen a Northline Utilities truck on the road early in the morning and that certain contract employees of Wilco had told bargaining unit employees that they were working outside the 6 a.m. to 10 p.m. schedule. Jamison asked King if he could refine the scope
 35 of the request for the contractor timesheets. King also told Jamison he did not see any of the Respondent's bargaining-unit employees working on e-tickets and priority one tickets. Jamison told King he would look into the issue.

³ King's October 9 email contained three additional information requests, including one for a list of all "tickets" assigned to contractors. The Respondent generates "e-tickets" and "priority one" tickets for repair work to electrical equipment. The tickets are based upon calls from police, fire rescue, or customers reporting equipment damage. This information request is not included in the General Counsel's complaint. However, as will be discussed below, the General Counsel is seeking to establish that the Company's response to this request likewise was unlawful.

After the meeting, Jamison sent an email to King the same day that documented their discussion. Jamison stated that gathering the requested information would be “unduly burdensome” for the Respondent, noting that it covered 25 days and four staging sites. Jamison asked King if he could submit a “less extensive, yet still relevant” request. Jamison stated the Respondent would investigate whether contractors from Wilco and Northline Utilities worked outside the 6 a.m. to 10 p.m. time range. Jamison also said he would investigate and provide the Union with the vendors and hours worked for the e-tickets and priority one tickets. King responded via email that same day, stating he was unwilling to water down his request and limit it solely to the two named contractors. He said he wanted the full request fulfilled.

On October 28, King typed up a grievance form, alleging a violation of the contract provision requiring unit employees to be offered overtime hours prior to contractors. (GC Exh. 8.) The text of the grievance stated the following as to the remedy being sought by the Union:

Requesting OT pay, meals and travel for ALL [bargaining-unit] employees not given the opportunity to work the same hours as contractors and other utilities from 9-15-2017 through 10-8-2017. This should include [transmission, substation, and customer service.]

King signed the grievance and gave it to the chief steward, Jordan Cook, for filing. However, to this point, the Union has not filed the grievance.⁴

King’s October 29 deadline for receiving the requested information came and went without a response from the Company. Thus, on November 1, King emailed Jamison and stated “2nd request, please provide by EOB on 11-3-17.” Jamison responded via email the same day, telling King the Respondent was in the process of gathering the requested information and expected to have it done by November 27. With respect to the request for contractor timesheets, Jamison stated a willingness to provide “specific information to address the potential issue you are attempting to review,” but reiterated that the request as submitted was unduly burdensome and needed to be refined. On November 8, King responded via email and told Jamison he was not willing to refine the request. He stated he needed to review all of the timesheets. King referenced an issue with an information request he had submitted to the Respondent that prior summer. King contended that he had demonstrated the Respondent

⁴ I find the record evidence insufficient to establish the Union actually filed the grievance with the Respondent. (Tr. 60-62, 80-81, 92-93; GC Exh. 8.) The grievance form entered into evidence is unsigned. Although he gave a signed grievance to Cook, King was unsure whether Cook had ever filed it thereafter. Jamison sees every grievance that comes through his area and he denied having ever seen this one. King easily could have checked with Cook prior to the hearing to determine what happened to the grievance form King gave him. Nonetheless, whether it has been filed or not, King noted that the parties’ collective-bargaining agreement gives the Union 28 days to file a grievance over an alleged violation of the contract. (Tr. 55.) He further stated that the Union’s position is that 28 days begins to run once the Union becomes aware of a violation.

initially provided incorrect information to him on that occasion. King closed the email by saying he expected the requested information on the November 27 date the Respondent said it would have the information gathered.

5 On November 27, Jamison emailed King the Respondent's response to the information request. (GC Exhs. 7 (p. 1), 9, and 10.) As to the first item requested, Jamison provided an electronic file entitled "Irma Naples." The file contained information on nearly 140 contractors and other utility companies that worked on the restoration efforts from September 17 to 24. The first column of the file, entitled "Travel Team Name," contained a code name (e.g.
10 "PikePikeGA065") for each contractor or outside utility. The file also contained the number of workers utilized by the contractor or outside utility, as well as the start and end dates of their restoration work. The file did not contain the actual name of each entity or indicate whether the entity was a contractor or outside utility. As to the Union's second request for contractor timesheets, Jamison wrote:

15 Please see attached files, titled, "Irma Naples. . .", for start and release dates for the vendors. The vendors were on a 6a-10p shift. Timesheets for Customer Service and Transmission/Substation are still in the process of being gathered and will be submitted to you
20 by 12/1/17.

Jamison also included a file entitled: "Ticket List to Irma," which contained a list of all tickets worked on by bargaining-unit employees and contractors. However, it did not identify which entries were for contractors, nor did it include the hours worked on each ticket. Jamison closed
25 the email by saying: "Please review the information that is provided and provide feedback as to whether this satisfies your request." King did not respond in writing to this email.

On or about December 1, Jamison provided King with customer service employee timesheets for the month of September and transmission employee timesheets for the months of
30 September and October. Jamison did not provide any timesheets for substation employees. Jamison did not explain why certain timesheets were not provided.

Shortly after receiving the Company's response, King and Jamison spoke once again. King asked when the Union could expect the rest of the information, in particular the contractor
35 timesheets, which the Respondent had not provided. Jamison responded that he did not have access to the contractor timesheets and someone else would have to provide the information.⁵ The Union then filed it unfair labor practice charge with the Board on December 5.

⁵ I credit King's testimony concerning the content of this conversation with Jamison. (Tr. 75-76.) In response to leading questions, Jamison denied that King ever responded to his November 27 email. (Tr. 91.) Later, Jamison conceded that he and King had spoken about the response. But Jamison claimed the discussion only concerned King's additional request for the Respondent's contracts with its contractors. (Tr. 97-98; GC Exh. 7, p. 3.) Given Jamison's written response, I find it inherently probable that King would ask him when the Union would receive the contractor timesheets. The purpose of

At the hearing, King and Jamison testified about the information requests which remained outstanding at that time. (Tr. 30-32, 76-77, 85-90, 103-106.) First and foremost, the Respondent never provided contractor timesheets. Jamison testified that the Respondent does not have access to contractor timesheets for hurricane restoration work and contractors do not provide them to the Respondent. Instead, contractors send the timesheets to a third-party vendor, who processes them for payment from the Respondent. Jamison did not testify as to any efforts the Respondent undertook to obtain timesheets from the contractors listed in the Irma Naples file. Second, King testified the Union never received any timesheets for substation employees or any information on work performed by Respondent crews from other geographic areas in Florida. Jamison testified that the Respondent did not provide this information, because no substation employees or outside crews worked on the restoration efforts performed from the four staging sites. However, the Respondent did not communicate this information to the Union prior to the hearing. Finally, King testified that the Irma Naples contractor list did not contain any information for October and the Union never received timesheets for customer service employees for October. Jamison stated that the Respondent did not provide any information for the time period after September 24, because electricity essentially had been restored by then and the four staging sites were shut down. But he also acknowledged that the Respondent used contractors in October after the staging sites were shut down for follow-up storm work. Jamison did not investigate whether the Respondent had any timesheets for those contractors. Moreover, the Respondent again did not communicate any of this information to the Union prior to the hearing.

ANALYSIS

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(5) by refusing to provide the Union with all of the information requested by King on October 9, 2017.

I. LEGAL FRAMEWORK

An employer has a statutory obligation to provide to a union that represents its employees, on request, information that is relevant and necessary to the union's performance of its duties as the exclusive collective-bargaining representative. *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2355 (2012); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Where the information requested concerns non-unit employees, the union bears the burden of establishing relevancy. *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997). A union satisfies its burden to do so, if it demonstrates either "a reasonable belief, supported by objective evidence,

King's information request was to determine if contractors were working outside the regular shift. Nothing in Jamison's November 27 email enabled King to determine this. Jamison only told King that contractors were scheduled from 6 a.m. to 10 p.m. This was a fact King already knew and one that is irrelevant to the question of whether contractors worked any overtime. King needed the contractor timesheets to answer the question. That King would ask Jamison about the contractor timesheets after receiving the November 27 response is the logical and expected reaction.

that the requested information is relevant," *Disneyland Park*, 350 NLRB 1256, 1257-1258 (2007) (citation omitted), or "a 'probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities,'" *Kraft Foods North America, Inc.*, 355 NLRB 753, 754 (2010) (quoting *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967)). Either way, a broad, discovery-type standard applies and the union's initial showing is not an exceptionally heavy one. *Ibid* (internal quotation marks and citations omitted); accord, e.g., *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

I. DID THE RESPONDENT VIOLATE SECTION 8(A)(5) BY FAILING AND REFUSING TO PROVIDE THE UNION WITH ALL RELEVANT, REQUESTED INFORMATION?

Applying the Board's legal framework here, the first issue to be addressed is whether the Union established the relevance of the information King requested concerning non-unit employees on October 9. Although the Respondent does not contest relevance, the Union nonetheless must sustain its burden in this regard. No question exists that the Union has done so. The parties' contract requires the Respondent to offer any overtime work associated with tropical storm restoration efforts to unit employees first. During the Irma restoration work, the Union obtained information suggesting contractors were working overtime hours which had not been offered to unit employees. King's subsequent information request for a contractor list and contractor timesheets would permit the Union to determine if any contractors worked outside of the 6 a.m. to 10 p.m. shift. If so, the Union could file a grievance alleging the Respondent failed to comply with the contractual overtime provisions. As a result, I find that the Union has demonstrated the relevance of the requested information. See, e.g., *Jack Cooper Transport Co.*, 365 NLRB No. 163, slip op. at 3 (2017) (information related to a grievance asserting an employer had diverted bargaining unit work to non-unit personnel was relevant, where the employer was signatory to contracts limiting such work diversions and prohibiting subcontracting); *Wachter Construction, Inc.*, 311 NLRB 215, 215-217 (1993) (union established relevance of payroll records sufficient to show the wages and benefits paid to contractors on certain construction jobs, where collective-bargaining agreement required employer's subcontractors to pay wages and benefits at least equal to those called for in the contract and to terminate any subcontractor agreement if the obligation was unfulfilled), *enf. denied* on other grounds 23 F.3d 1378 (8th Cir. 1994); *Hawkins Construction Co.*, 285 NLRB 1313, 1315-1316 (1987) (union's request for a list of subcontractors, subcontractor agreements, and wage and benefit data of subcontractors who worked on certain projects was relevant, where collective-bargaining agreement required subcontractor to abide by the terms of that agreement), *enf. denied* on other grounds 857 F.2d 1224 (8th Cir. 1988).

When requested information has been demonstrated to be relevant, the burden shifts to the respondent to establish that the information is not relevant, does not exist, or for some other valid and acceptable reason cannot be furnished to the requesting party. *Samaritan Medical Center*, 319 NLRB 392, 398 (1995); *Yeshiva University*, 315 NLRB 1245, 1248 (1994). Again, the most significant piece of information the Respondent did not provide was the contractor timesheets. The Respondent asserts the timesheets are not in its possession and not otherwise

available to it, because contractors submitted them to a third-party vendor. I find no merit to this contention. To establish an unavailability of information defense, the Respondent needed to present evidence that it actually requested the timesheets from its contractors. See, e.g., *The Earthgrains Co.*, 349 NLRB 389, 399 (2007) and cases cited therein; *García Trucking Service*, 342 NLRB 764, 764 fn. 1 (2004). It likewise had to demonstrate the contractors refused to or were unable to provide the timesheets. See, e.g., *Pratt & Lambert*, 319 NLRB 529, 534 (1995); *Public Service Co. of Colorado*, 301 NLRB 238, 246-247 (1991); *United Graphics*, 281 NLRB 463, 466 (1986). The Respondent made neither showing. Jamison did not request timesheets from contractors who performed Irma restoration work out of the four staging sites. Instead, he told King "someone else" would have to provide the timesheets to the Union. Jamison put King in the position of having to request the information from the Respondent's contractors. The Respondent, not the Union, had that obligation. Furthermore, it is not enough, as the Respondent suggests, that Jamison told King in his November 27 email the contractors were scheduled from 6 a.m. to 10 p.m. Jamison did not state that contractors only worked the scheduled shifts. Even if he had, King was not required to take Jamison at his word and was entitled to the timesheets to verify the claim.

The Respondent also argues that no violation occurred, because King did not respond to Jamison's November 27 email. However, the credited facts do not support this defense. The Respondent points to the end of Jamison's email, where he stated: "Please review the information that is provided and provide feedback as to whether this satisfies your request." The Respondent claims, since King never renewed his information request or advised Jamison that the information he provided was inadequate, Jamison thought his response was satisfactory. However, based upon my credibility determination described above, I found that King and Jamison did speak after Jamison's initial response. During the conversation, King specifically asked Jamison about the contractor timesheets. Jamison told King he did not have access to them and King would have to get them from someone else. At that point, King already had made two written requests for the timesheets and also tacitly agreed to an extension to his requested deadline for the Respondent to provide the information. Having been denied a third time, King filed an unfair labor practice charge with the Board. Thus, Respondent's contention that King did not respond is factually inaccurate. Given the sequence of events and Jamison's last response, King likewise did not need to continue the dialogue.⁶

The cases relied upon by the Respondent to support its argument in this regard do not alter my conclusion. In *Day Automotive Group*, 348 NLRB 1257 (2006), the Board affirmed a judge's dismissal of a refusal-to-provide-information allegation. When the employer there proposed in bargaining to move unit employees to a new health insurance plan, the union requested the plan documents and a summary plan description. In response, the employer did

⁶ Even if King had not responded to Jamison's November 27 email, Jamison could not have thought the information he provided on contractor timesheets satisfied the Union's request. As previously noted, the response did not enable the Union to verify if contractors worked any overtime. Thus, and contrary to the Respondent's assertion, the response was plainly inadequate to fulfill the purpose of the Union's information request. See *Airport Aviation Services*, 292 NLRB 823, 823-824 (1989).

not provide the specific documents requested, but rather a health plan booklet and a grid showing a summary of the plan benefits. The union reviewed the information provided, rejected the employer's health care proposal, and never asked for more information. The judge concluded that, objectively, the information the employer provided to the union enabled it to effectively evaluate the health care proposal, even if the employer had not provided the exact documents requested. In contrast here, the information the Respondent provided to the Union in no way enabled the Union to determine if contractors performing Irma restoration work were working outside of the 6 a.m. to 10 p.m. hours for which they were scheduled. In *International Game Technology*, 366 NLRB No. 170 (2018), the Board's decision solely addressed the issue of the relevance of a union's request for a list of all of the employer's locations nationwide. Relevance is not in dispute in this case. Furthermore, in finding no violation, the Board noted the union's failure to respond to the employer's specific request for a relevance explanation. Because the union did not respond to the request, the Board found such silence would "reasonably signal to the [r]espondent that [the union] was satisfied with the information it had received and that the list of locations was not relevant or needed." Here, King did not respond with silence. He and Jamison had a conversation after the Respondent's initial response and King reiterated for a third time that he wanted the contractor timesheets. In *Whitesell Corp.*, 352 NLRB 1196 (2008), *affd.* and incorporated by reference 355 NLRB 635 (2010), the Board found no violation when an employer responded to a union's request for information to evaluate a layoff and recall proposal. After receiving the response, the union did not renew its information request or indicate that it expected more information. In addition, the judge in the case did not identify any outstanding information requested by the union. In this case, King did respond and asked again for the timesheets, which likewise have been identified as the key piece of missing information. In sum, I find these cases inapposite to this one.⁷

Finally, as to the Union's first request for a count of contractors by service center, the Respondent asserts that it fully responded to King's request. However, Jamison's testimony establishes the response was not complete. The Union asked for a list of all contractors who performed Irma restoration work by service center area. In addition to contractors themselves, the Union asked that the list include other utility companies and other Respondent crews who came from outside the four service centers to perform restoration work. In response, the Respondent submitted the Irma Naples file, which provided a list of each contractor, the number of workers employed by each contractor, the staging site (not the service center) from which the contractors worked⁸, and their start and release dates. The only contractors/employers not listed were Respondent crews that came from outside the service centers, because no such crews assisted in the restoration efforts. Nonetheless, one category of

⁷ The Respondent's reliance on *Springfield Day Nursery a/k/a Square One*, 362 NLRB No. 30 (2015), likewise is unavailing. In that case, the judge concluded an employer did not unreasonably delay in providing information to a union, because the employer made a reasonable good-faith effort to respond to the request as promptly as it could. However, the General Counsel did not file exceptions to the judge's decision. *Id.*, slip op. at 1. Thus, the issue was not before the Board. *Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel)*, 357 NLRB 1683, 1683 fn. 1 (2011).

⁸ How staging site areas related to service center areas is not clear from the record. (Tr. 87.)

outstanding information remains. The Irma Naples file did not list any contractors who worked after September 24 to October 8, despite the Union's inclusion of that time period in the request. At the hearing, Jamison first explained that the Respondent shut down the staging sites as of September 24, so no contractors could have been working thereafter. But he later added that the Respondent utilized additional contractors in October for follow-up work, after the staging site shutdown. Jamison admitted the Respondent provided no information to the Union on those contractors. He claimed it was unnecessary to do so, because the Union's request was limited to work out of the four staging sites. However, neither the Union's written request nor any of King's statements to Jamison after submitting the request limited the information sought to the four staging sites. Thus, the Respondent did not fully respond to the Union's request.⁹

For all these reasons, I find that the Respondent violated Section 8(a)(5) by failing and refusing to furnish the Union with all of the relevant information King requested on October 9. The Respondent did not provide contractor timesheets for Irma restoration work from September 15 to October 8; a list of contractors who performed that work from September 25 to October 8; and timesheets for customer service employees from October 1 to 8.

II. DID THE RESPONDENT VIOLATE SECTION 8(A)(5) BY FAILING TO CONTEMPORANEOUSLY INFORM THE UNION THAT CERTAIN RESPONSIVE DOCUMENTS DID NOT EXIST?

In his brief, the General Counsel also claims the Respondent independently violated Section 8(a)(5) by failing to timely disclose to the Union that no responsive information existed to certain of King's requests. This alleged violation is not contained in the General Counsel's complaint. Thus, the preliminary question is whether it is appropriate for me to consider the allegation and reach the merits of the issue.

The Board may find and remedy a violation of the Act even in the absence of a specific complaint allegation, if the issue is closely connected to the subject matter of the complaint and has been fully litigated by the parties. *Pergament United Sales, Inc.*, 296 NLRB 333 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). An employer's failure to timely disclose to a union that requested information did not exist is a fact "closely connected" to a complaint allegation that the

⁹ In his emails to King concerning the information request, Jamison twice stated that producing the contractor timesheets was unduly burdensome. However, the Respondent did not plead this as an affirmative defense in its answer, nor raise this defense in its brief. Even if it had, the Respondent has not established that producing the contractor timesheets would be overly burdensome. At the time, Jamison only told King it would be "unduly burdensome" or "hard" to collect that information. (Tr. 56-59; GC Exh. 7, pp. 2-3.) Jamison did not explain why. At the hearing and in response to leading questions, Jamison said only that gathering the data was unduly burdensome, because the Hurricane Irma restoration effort was the largest mobilization of an electrical workforce in the history of the United States. (Tr. 84.) The Respondent made no factual showing as to the cost or effort involved in producing the contractor timesheets. It also made no request to the Union to bargain over the costs of obtaining the information. Therefore, the record evidence is insufficient to demonstrate that producing the timesheets was overly burdensome. See, e.g., *Martin Marietta Energy Systems, Inc.*, 316 NLRB 868, 868 (1995); *Yeshiva University*, 315 NLRB at 1248-1249.

employer failed to furnish the union with relevant information it had requested. *General Drivers, Warehousemen & Helpers Local Union No. 89*, 365 NLRB No. 115, slip op. at 1-2 (2017); *Grayhawk PA, Inc.*, 364 NLRB No. 37, slip op. at 7 (2016). The determination of whether a matter has been fully litigated “rests in part on ‘whether the respondent would have altered the conduct of its case at the hearing, had the specific allegation been made.’” *Piggly Wiggly Midwest, LLC*, 357 NLRB at 2345 (quoting *Pergament*, supra at 335).

In *General Drivers Local 89*, supra, the General Counsel’s complaint alleged the respondent union failed to furnish relevant, requested information to an employer in violation of Section 8(b)(3). The judge found that violation, as well as an unalleged violation because the union failed to timely notify the employer that information responsive to the employer’s request did not exist. In affirming the latter conclusion, the Board found the two allegations were closely related, because they involved the same evidentiary facts: the employer’s requests for information and the union’s response to those requests. The Board likewise stated the allegations presented the same ultimate issue: whether the union’s response satisfied its obligation to bargain collectively and in good faith with the employer. Second, the Board found the issues were fully litigated. The union did not object to testimony from or question a witness concerning when the union ultimately revealed certain documents did not exist. The union later elicited testimony to explain the delay. In these circumstances, the Board held the Respondent’s due process rights were not violated by finding the unalleged violation.¹⁰ See also *Graymont PA, Inc.*, supra, slip op. at 7 (finding unalleged violation for employer’s failure to inform union no information responsive to its request existed, where complaint alleged the employer failed to timely furnish the union with relevant requested information).

In this case, I conclude it is proper to consider the unalleged claim that the Respondent violated Section 8(a)(5) by failing to timely disclose to the Union that certain responsive information did not exist. The General Counsel’s complaint contains an allegation that the Respondent failed and refused to furnish information requested by the Union. As noted above, the Board already has held that a failure-to-timely-disclose information allegation is closely related to a refusal-to-provide-information allegation. As to whether the issue was fully litigated, the Respondent elicited testimony from Jamison at the hearing that no outside crews of the company came to Naples to perform restoration work, because they were working elsewhere in the State of Florida at the time. (Tr. 87-88.) When asked by counsel for the General Counsel whether the Respondent had provided the timesheets for those crews, Jamison again responded that they had not performed restoration work out of the four staging sites. (Tr. 32.) In addition, Jamison testified that he did not provide timesheets for substation employees, because those employees likewise were not working out of the Respondent’s four staging sites. (Tr. 90.) The Respondent was not precluded from presenting any further evidence it wished to

¹⁰ Although *General Drivers Local 89* involved an 8(b)(3) violation, the holding in the case applies with equal force to the 8(a)(5) refusal-to-provide-information allegation in this case. The only difference between the two is whether the charged party is a union or an employer.

on these issues. As a result, it cannot be said the Respondent would have altered its conduct at the hearing, if the General Counsel had included this specific allegation in the complaint.¹¹

Turning to the merits, I find that the record evidence establishes the violation. As part of its request, the Union sought a list of Respondent crews who traveled from other areas to work on the Irma restoration. In his November 27 response, Jamison supplied the Irma Naples file with a list of contractors, but did not advise King that the list did not contain outside crews because none worked on the restoration. Thereafter, Jamison never informed King of that fact, until the hearing. The Union also requested timesheets for outside crews and substation employees. In his November 27 response, Jamison stated that the Respondent still was gathering timesheets for substation employees. He said nothing regarding timesheets for employees of outside crews. Thereafter, Jamison did not provide either item. Until the hearing, he also did not inform King that, because those employees did not work on the restoration efforts, the information did not exist. The duty to furnish information includes the duty to “timely disclose that requested information does not exist.” *Endo Painting Service, Inc.*, 360 NLRB 485, 486 (2014). The Respondent violated Section 8(a)(5) by waiting 13 months before disclosing to the Union that no outside crew or substation employees worked on the Irma restoration and thus no responsive information existed for those employees. *Dover Hospitality Services*, 359 NLRB 1103, 1107–1108 (2013) (respondent unlawfully waited 13 months to provide the union with certain requested information and to tell the union that the remainder of the requested information did not exist), *affd.* and incorporated by reference 361 NLRB 906 (2014), *enfd.* 636 Fed.Appx. 826 (2d Cir. 2016); *Tennessee Steel Processors*, 287 NLRB 1132, 1132–1133 (1988) (respondent unlawfully waited 6 months to inform the union that certain requested information did not exist).¹²

¹¹ Of course, the allegation was not included in the complaint, because neither the General Counsel nor the Union was aware prior to the hearing that the Respondent was claiming some of the requested information did not exist.

¹² In his brief, the General Counsel also argues the Respondent violated Sec. 8(a)(5) by failing to provide the Union with information concerning e-ticket and priority one work. This allegation likewise is not contained in the complaint. I decline to find this claimed violation, because the issue was not fully litigated by the parties. At the hearing, the Respondent was resolute in objecting to the presentation of any evidence regarding the other items in King’s October 9 information request. In particular, the Respondent objected to the introduction of the “Ticket List for Irma” file, because King’s request for a ticket list was not in the complaint. In response, counsel for the General Counsel confirmed that only the two listed items in the complaint were being litigated. He then elicited testimony from King, in which King stated the file was relevant to showing the Respondent’s response to the two requests listed in the complaint was insufficient. (Tr. 69–70.) As a result, I allowed the file into evidence for that purpose. From that discussion, the Respondent could not have concluded that the General Counsel then would claim an additional violation related to King’s request for a ticket list. Indeed, the Respondent makes no mention of the ticket list in its brief. I conclude that, had it known the General Counsel would seek to add this specific violation to the complaint allegations, the Respondent would have altered its conduct at the hearing.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Brotherhood of Electrical Workers (IBEW) System Council U-4 and IBEW Local 641 are labor organizations within the meaning of Section 2(5) of the Act.
3. The Union is, and at all material times has been, the exclusive collective-bargaining representative of the following appropriate unit:

All employees of the Company working in the classifications of employees in the Company's nuclear division, power systems division—distribution, power systems division—delivery, and power generation division that are listed in Exhibit "A" of the collective-bargaining agreement between Respondent and the Union which is effective by its terms from October 31, 2017 to October 31, 2020.

4. By refusing to provide relevant information in response to the Union's October 9, 2017 request for information, the Respondent violated Section 8(a)(5) and (1) of the Act.
5. By failing to disclose in a timely manner that it had no information responsive to certain requests in the Union's October 9, 2017 request for information, the Respondent violated Section 8(a)(5) and (1) of the Act.
6. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent is hereby ordered to bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit described above, by furnishing to the Union in a timely manner the information it requested on October 9, 2017, to the extent the Respondent has not already done so: (1) Utility and contractor count by service center boundaries to include BSW, FMO, GDO, and GGO from September 15 to October 8, 2017; and (2) timesheets for all contractors included in request 1 and timesheets for customer service, transmission, and substation employees, for the period from September 15 to October 8, 2017.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Florida Power & Light Company, Juno Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by failing, upon request, to provide information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) Failing to disclose in a timely manner that it has no information responsive to any Union request for information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the information requested by the Union on October 9, 2017, insofar as such information has not already been furnished.

(b) Within 14 days after service by the Region, post at its facility in Juno Beach, Florida, as well as at its Bonita Springs Workforce, Fort Myers Operations, Gladiolus Operations, and Golden Gate Operations service centers, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 9, 2017.

- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., December 27, 2018



Charles J. Muhl
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with International Brotherhood of Electrical Workers, AFL–CIO, System Council U-4 and Local 641 (the Union), by refusing to furnish the Union with requested information that is relevant and necessary to its role as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All employees of the Company working in the classifications of employees in the Company's nuclear division, power systems division—distribution, power systems division—delivery, and power generation division that are listed in Exhibit "A" of the collective-bargaining agreement between Respondent and the Union which is effective by its terms from October 31, 2017 to October 31, 2020.

WE WILL NOT fail to disclose in a timely manner that we have no information responsive to any Union request for information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union in a timely manner the information it requested on October 9, 2017, to the extent we have not already provided the information.

FLORIDA POWER & LIGHT COMPANY

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

South Trust Plaza, 201 East Kennedy Boulevard, Ste 530, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/12-CA-211064> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2345.